UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR A UNIFIED INDEPENDENT PARTY, INC., LENORA B. FULANI, RICHARD WINGER, PAULINE STOUT, CRAIG HARVEY, DANIEL MOOS, LINDA FRIEDRICH, JOHN OPDYCKE, NANCY ROSS, REINHOLD WAPPLER, DAVID LIEBTAG, CATHY STEWART, ROBERT MANN, CONSTITUTION PARTY NATIONAL COMMITTEE, INC., INDEPENDENCE PARTY OF NEW YORK and DISTRICT OF COLUMBIA REFORM PARTY, Plaintiffs, - against - FEDERAL ELECTION COMMISSION, Defendant.	00 Civ. 3476 (BSJ) (JCF) REPORT AND RECOMMENDATION

TO THE HONORABLE BARBARA S. JONES, U.S.D.J.:

This case concerns a challenge to regulations promulgated by the Federal Election commission (the "FEC") governing the conduct of debates in federal elections. The plaintiffs argue that the regulations in question, 11 C.F.R. §§ 110.13 and 114.4(f) (the "Debate Regulations"), are inconsistent with the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 et seq. The plaintiffs also initially contended that the challenged regulations are unconstitutional, but they have since abandoned that argument.

The FEC has moved to dismiss the Amended Complaint on the grounds that the plaintiffs have failed to exhaust administrative remedies and that they lack standing. The

FEC has also moved to strike certain material contained in the plaintiffs' submissions on the basis that it was not included in the administrative record at the time the regulations were adopted. Finally, each side has moved for summary judgment.

For the reasons explained below, some of the named plaintiffs have standing to challenge the Debate Regulations, and they need not exhaust administrative remedies with respect to the claims they advance. However, the plaintiffs' claims fail on the merits, and summary judgment should therefore be granted in favor of the defendant.

Background

The Debate Regulations create a structure for sponsoring debates in federal elections, including debates among presidential candidates. Such debates may be sponsored by "staging organizations," which may be either nonprofit organizations or broadcasters. 11 C.F.R. § 110.13(a). Any debate must then include candidates chosen to participate by "pre-established objective criteria." 11 C.F.R. § 110.13(c). The structure of the debate cannot promote one candidate over any other. 11 C.F.R. § 110.13(b)(2). A nonprofit staging organization is authorized to accept donations from corporations or labor organizations to defray the

costs of a debate. 11 C.F.R. § 114.4(f).

The plaintiffs raise two types of objections to the regulations. Their practical concern is that the Debate Regulations incorporate the advantages that the Democratic and Republican parties enjoy over minor parties. This occurs because the major parties can boycott any debate that includes candidates from minor parties, thereby forcing the sponsoring organizations to hold only bilateral rather than multilateral debates. Thus, because the regulations do not require the inclusion of minor parties, they permit their exclusion.

The plaintiffs' legal argument is that the Debate Regulations conflict with FECA because they permit corporate and union political contributions, which are prohibited by statute. In general, FECA makes it unlawful for any corporation or labor organization "to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in . . . Congress are to be voted for . . . ." 2 U.S.C. § 441b(a). The FEC argues in part, however, that the regulations are valid because the definitional section of FECA provides that the term "expenditure" does not include "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. § 431(9)(B)(ii). According

to the FEC, debates are a means of encouraging voting, and thus their sponsors may properly receive corporate and union funds.

The plaintiffs fall into three categories. The Committee for a Unified Independent Party, Inc. ("CUIP") is a not-for-profit corporation that allegedly seeks to conduct a series of debates that would include minor party candidates as well as candidates of the Democratic and Republican parties. (Am. Compl. ¶ 10). CUIP contends that it is disadvantaged by the Debate Regulations because they allow CUIP's competitors -- other debate sponsoring organizations -- to hold debates that are only bipartisan and are therefore more attractive to Democratic and Republican candidates.

Three of the plaintiffs -- the Constitution Party National Committee, Inc., the District of Columbia Reform Party, and the Independence Party of New York (collectively the "Political Party Plaintiffs") -- are political parties that sponsor candidates who run against Democratic and Republican candidates in federal elections. The Political Party Plaintiffs allege that the Debate Regulations violate FECA by allowing corporate and union funds to be expended on events that provide exposure only to major party candidates and exclude the candidates of their parties. Thus, they claim that their

ability to compete in the electoral arena is impeded.

Finally, plaintiffs Lenora B. Fulani, Richard Winger, Pauline Stout, Craig Harvey, Daniel Moos, Linda Friedrich, John Opdycke, Nancy Ross, Reinhold Wappler, David Liebtag, Cathy Stewart, and Robert Mann (the "Minor Party Supporters") are all supporters of minor parties. Some of them are leaders of these parties and therefore allege that the Debate Regulations interfere with their ability to build viable alternatives to the Democratic and Republican parties. Other Minority Party Supporters contend that the challenged regulations deprive them of the information that they would receive from multilateral debates that would allow them to make more informed electoral choices. The minor party supporters also assert that by failing to classify the debate sponsoring organizations as political action committees, the Debate Regulations deprive the public of information about contributions made to the debate sponsors and, indirectly, to the Democratic and Republican candidates.

Discussion

A. Mootness

At the time they filed this action, the plaintiffs hoped to nullify the Debate Regulations in time to precipitate multiparty debates in the year 2000 election cycle. That cycle is now complete: presidential debates

were held with only the Democratic and Republican candidates, and the election is over. Thus, the question arises whether this action is moot. It is not. The law is well settled that a facial challenge to an election law remains justiciable even after the particular election where it is first raised has passed. See Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); Fulani v. League of Women Voters Education Fund, 882 F.2d 621, 628 (2d Cir. 1989) ("Fulani I").

B. Exhaustion of Administrative Remedies

The FEC argues that this action should be dismissed on the ground that the plaintiffs failed to present their arguments to the agency during the rulemaking process or otherwise. However, as the First Circuit recently ruled in another challenge to the same regulations, "[t]he FEC has steadfastly maintained that these debate regulations are valid and there is no point in requiring plaintiffs to go through exhaustion." Becker v. Federal Election Commission, 230 F.3d 381, 384 (1st Cir. 2000) (citations omitted). Exhaustion is therefore not required.

C. Standing

Article III of the United States Constitution limits federal courts to deciding justiciable cases and controversies. Accordingly, the party invoking the court's authority must "show that he personally has

suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (citations omitted). This standing requirement is composed of three elements: (1) actual or potential injury that is both concrete and particular to the plaintiff, (2) a sufficient nexus between that injury and the defendant's conduct, and (3) the likelihood that a favorable court decision will redress the injury. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Becker, 230 F.3d at 385.

1. CUIP

CUIP contends that the Debate Regulations place it at a competitive disadvantage to other sponsoring organizations that are willing to hold bilateral debates. Such a competitive disadvantage is well-recognized as injury-in-fact sufficient to meet the first requirement for standing. See Clarke v. Securities Industry Association, 479 U.S. 388, 403 (1987); United States Catholic Conference v. Baker, 885 F.2d 1020, 1028-29 (2d Cir. 1989) ("Catholic Conference").

However, the disadvantage that CUIP suffers is not fairly traceable to any action by the FEC. The Debate Regulations simply create a structure by which

organizations may sponsor debates; they embody no preference as between bilateral or multilateral debates. Rather, it is the independent decision of Democratic and Republican candidates not to participate in debates that include minor party candidates that results in CUIP being disqualified as a sponsor. CUIP's competitive disadvantage would disappear, then, if it were willing to sponsor bilateral debates or if major party candidates were willing to debate minor party candidates. But its disadvantage is unrelated to corporate or union funding that it or other potential sponsors would receive under the Debate Regulations. CUIP thus fails to satisfy the traceability requirement for standing.

2. Political Party Plaintiffs

The Political Party Plaintiffs also allege standing based on competitive disadvantage, but with a different twist. They assert that they are impeded in their ability to compete against the major parties, because the Debate Regulations permit them to be excluded from bilateral debates.

As Judge Newman observed in Catholic Conference, "standing is frequently recognized for those who seek to challenge the lawfulness of governmental actions that inure to the benefit of their competitors." 885 F.2d at 1032 (Newman, J. dissenting) (citations omitted). Here,

of course, permitting corporate or union funds to be expended for debates that exclude minor party candidates redounds to the benefit of the two major parties. Moreover, in Fulani I, 882 F.2d at 626-28, the Second Circuit held that Lenora Fulani, then a minor party candidate for President, had standing to challenge the government's granting of tax-exempt status to the League of Women Voters, which was sponsoring debates but excluding minor party candidates.

Shortly after deciding Fulani I, the Second Circuit issued its decision in Catholic Conference, where it denied standing to plaintiffs who sought to challenge the tax exempt status of the Catholic Church on the ground that the Church engaged in political activity concerning abortion and therefore was disqualified from the exemption. 885 F.2d at 1021-22. In part, the Court rejected the theory that as advocates of reproductive choice, the plaintiffs suffered a competitive disadvantage because the Church received a tax exemption. Id. at 1028-31. Some of the plaintiffs were tax-exempt organizations but chose not to engage in political advocacy and so were not the Church's "competitors." Id. at 1029. Thus, they did not meet the "requirement that in order to establish an injury as a competitor a plaintiff must show that he personally competes in the

same arena with the party to whom the government has bestowed the assertedly illegal benefit." Id.

Recognizing the apparent tension between this decision and Fulani I, the plaintiffs in Catholic Conference petitioned for rehearing. The petition was denied. The Court characterized the decision in Fulani I as according "competitor standing . . . to a political candidate to challenge her exclusion from a televised debate in which her political rivals were invited to participate." Id. at 1034. But the Court concluded that "the competition in Fulani is more direct and immediate than that shown here." Id.

Finally, in Fulani v. Bentsen, 35 F.3d 49 (2d Cir. 1994) ("Fulani II"), a case "somewhat similar" to Fulani I, the Second Circuit held that the plaintiffs did not have standing. Id. at 52. The FEC argues that Fulani II is controlling here. In that case, as in Fulani I, the plaintiff, then a minor party candidate for President, sought to revoke the tax-exempt status of the League of Women Voters, which sponsored a debate from which the plaintiff was excluded. Id. at 49-50. However, CNN, the network that was co-sponsoring the debate, had independently determined not to include the plaintiff as a participant. Id. at 52-53. Even if the League of Women Voters dropped out as a sponsor in order

to preserve its tax exempt status, CNN could have proceeded alone. Thus, according to the Court, Fulani II "is not about Fulani's ability to participate in a debate. Rather, this case is about the alleged incremental advantage accorded participants in debates in which the League plays a sponsoring role." Id. at 52. In the instant case, the Political Party Plaintiffs do not merely allege the loss of such an "incremental advantage;" they assert that their candidates are excluded altogether from debates that would give them critical public exposure. (Am. Compl. ¶¶ 18, 19). Accordingly, the injury alleged is more akin to that which provided a basis for standing in Fulani I than it is to Fulani II.

Nevertheless, the FEC relies on language in Fulani II where the Court specifically rejected the plaintiff's claims of competitive advocate standing. The Court alluded to the standard in Catholic Conference that to qualify for such standing, a plaintiff must compete in the same arena as the recipient of the governmental benefit at issue. Fulani II, 35 F.3d at 54. Furthermore, the Court went on to state, "We decline to extend the rule of Catholic Conference to encompass not only a plaintiff's competitors in a defined area, but also any entity that provides a tangential benefit to

those competitors." Id. Thus, the FEC argues that since the government bestows benefits in this case on debate sponsors and the Political Party Plaintiffs do not compete directly with such sponsors, these plaintiffs lack standing. (FEC Memorandum in Support of Motion to Dismiss at 20-21).

The FEC reads Fulani II too broadly. First, the general language concerning the absence of competitive advocate standing where only a "tangential benefit" is received by the plaintiff's competitors must be read in the context of the discussion that immediately follows. The Court held that "[a]s to Fulani's alleged loss of competitive advantage to her competitors, the presidential candidates who appeared in the Debate under the cosponsorship of the League and CNN (as distinguished from the sole sponsorship of CNN), Fulani has not established `that she suffered sufficient injury to establish standing'" Fulani II, 35 F.3d at 54 (quoting Catholic Conference, 885 F.2d at 1034). Thus, the benefit of the tax exemption was "tangential" in that case in the sense that it was not a significant factor in whether the plaintiff received a forum to air her viewpoint.

Second, if Fulani II were read as the FEC advocates -- to preclude any claim of competitor standing where the

governmental benefit is bestowed directly on an entity other than the plaintiff's direct competitor -- then Fulani I would have been overruled. The receipt of governmental benefits in Fulani I was the League of Woman Voters; the plaintiff's competitors were major party candidates. The plaintiff would not have had standing under the FEC's construction of Fulani II. But in Fulani II, the Court distinguished rather than overruled Fulani I. Those distinctions are not present in this case, and Fulani I therefore controls. Accordingly, the Political Party Plaintiffs have standing.

3. Minor Party Supporters

One of the Minor Party Supporters also has standing. As New York County Chair of the Independence Party and a member of the State Executive Committee, Cathy Stewart's personal stake in the litigation is equivalent to that of the Political Party Plaintiffs.

Lenora Fulani, the Independence Party candidate for President in 1988 and 1992 also claims standing. However, the plaintiffs' brief indicates that she is not now a candidate, and there is no indication that she will be in the future. If Ms. Fulani held a formal position in a minor party, then, like Ms. Stewart, she would have a sufficiently particularized interest to support

standing. But the Amended Complaint alleges only that she is "an activist in and leader of the Independence and Reform Parties." (Am. Compl. ¶ 11). Thus, she is indistinguishable from any active party member and therefore does not suffer the necessary specific injury.

The interests of the remaining Minor Party Supporters are even more attenuated. Some are registered voters who assert a general interest in obtaining information about minor parties. (Am. Compl. ¶¶ 15-17). One plaintiff is eligible to vote but is not even registered. (Am. Compl. ¶ 14). These plaintiffs do not attain standing either as voters in general or as supporters of parties that may be disadvantaged by the Debate Regulations. See Becker, 230 F.3d at 389-90; Gottlieb v. Federal Election Commission, 143 F.3d 618, 621-22 (D.C. Cir. 1998).

Finally, the Minor Party Supporters contend that they have standing by virtue of their desire for information about the source of political contributions that inure to the benefit of the major parties. According to the plaintiffs, the debate sponsors are in reality political action committees for the Democratic and Republican parties, and, as such, their sources of funding must be publicly disclosed. Thus, the plaintiffs allege that they have suffered "informational injury"

sufficient to create standing under Federal Election Commission v. Akins, 524 U.S. 11, 24 (1998). But even if the plaintiffs may be considered to have been harmed, this informational injury is not redressable here. If the Debate Regulations were nullified, the consequence would be that no nonprofit debate sponsor would receive corporate or union contributions, not that the source of such contributions would be revealed.

D. The Merits

Since the Political Party Plaintiffs and Ms. Stewart have standing to challenge the Debate Regulations, it is appropriate to proceed to the merits. While the motions for summary judgment were pending in this case, the First Circuit rendered its opinion in Becker. Because that decision contains a comprehensive and entirely persuasive analysis of the validity of the regulations, the discussion here may be somewhat abbreviated.

The plaintiffs contend that the FEC exceeded its authority in promulgating the Debate Regulations because those regulations conflict with provisions of FECA. Such an argument must be viewed within the framework of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), which requires a two-part analysis. First, if Congress has clearly expressed its intent with respect to the precise question at issue,

then no further inquiry is needed: the regulations either do or do not conform to Congress' express direction. Id. at 842-43. However, if the statute is silent or ambiguous, then the court must determine whether the regulations are based on a permissible construction of the statute. Id. at 843. At that stage, the court must defer to any reasonable statutory interpretation by the agency. Id. at 844; see also United States v. Haggar Apparel Co., 526 U.S. 380, 391-92 (1999).

As noted above, FECA generally prohibits corporations and labor organizations from making contributions or expenditures in connection with any federal election. 2 U.S.C. § 441b(a). A contribution or expenditure is defined as "any direct or indirect payment . . . or gift . . . to any candidate, campaign committee, or political party or organization." 2 U.S.C. § 441b(b)(2). There are, however, three exceptions. First, a corporation may communicate with its own shareholders and executive personnel while a union may contact its members. 2 U.S.C. § 441b(b)(2)(A). Second, nonpartisan registration or get-out-the-vote campaigns may be directed by a corporation to its stockholders and executives or by a union to its members. 2 U.S.C. § 441b(b)(2)(B). Third, a corporation or labor

organization can establish a segregated fund for political purposes. 2 U.S.C. § 441b(b)(2)(C). In addition, the term "expenditure" is defined not to include "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. § 431(9)(B)(ii).

The plaintiffs' argument that corporate or union funding of bilateral debates is clearly prohibited by the statute is unavailing. First, "it is not clear on the face of the definitions of `contribution' and `expenditure' that corporate disbursements to nonpartisan debate staging organizations even fall within the scope of the Act's coverage in the first instance." Becker, 230 F.3d at 394. Moreover, these definitions "include" certain uses and "shall not include" others, thus incorporating substantial flexibility in the statutory scheme. Id. And, even if aid to a debate sponsor would otherwise be a prohibited "contribution" or "expenditure," the question remains whether it is nevertheless permitted as a "nonpartisan activity designed to encourage individuals to vote or register to vote" under 2 U.S.C. § 431(9)(B)(ii). Id. Thus, Congress has not expressed a clear intent in FECA to foreclose corporations and labor organizations from funding debates that exclude minor party candidates.

It is therefore necessary to proceed to the second prong of Chevron. As the First Circuit held in Becker, the FEC's construction of the statute is not unreasonable. When it first promulgated regulations concerning debates in 1979, the FEC determined that Congressional policy underlying the statutory exceptions was to "permit corporations and unions to fund activity directed to the general public to encourage voter participation so long as the activity is conducted primarily by a nonpartisan organization." Id. at 396 (citations omitted). It also analogized the educational purpose of debates to the goals underlying nonpartisan get-out-the-vote campaigns. Id.

The FEC's interpretation, reasonable on its face, was further supported by subsequent Congressional action. FECA includes a "report and wait" provision under which the FEC submits proposed regulations to Congress after which the regulations only become effective if Congress does not disapprove them within a prescribed period. 2 U.S.C. § 438(d); see also Becker, 230 F.3d at 391, 395. In this case, Congress did disapprove the first incarnation of the Debate Regulations, apparently on the ground that they were too burdensome to sponsoring organizations. Id. at 396 & n.17. However, Congress subsequently acquiesced in the regulations in their

current form. Id. at 396. While not dispositive, this is some indication that Congress considered the FEC's interpretation to be consistent with the statute.

Although the FEC's construction of FECA is reasonable, the plaintiff's interpretation is also plausible. "Insofar as . . . debates have the primary effect of showcasing the candidacies of those selected to participate, [it is reasonable to conclude] that corporate funding of the debates might be viewed as contributing in effect to the candidacies of the participants." Id. at 397. Furthermore, Congress may have intended to level the electorial playing field for all candidates, not merely to ensure a fair contest between the Democratic and Republican parties while enhancing their duopoly power. But as worthy as such goals are as a matter of policy, they were not articulated in FECA clearly enough to foreclose the FEC's interpretation.

As the court concluded in Becker:

> The debate regulations at issue do not contravene the unambiguously expressed intent of Congress, as reflected in the FECA statutory scheme, but rather fall within the scope of the policymaking authority Congress delegated to the FEC under the Act. Moreover, the regulations reflect a permissible construction of the statute, indeed one that easily falls within the reasonable ambit of the statutory terms.

Id. at 397.

Conclusion

For the reasons set forth above, the Political Party Plaintiffs and Cathy Stewart have standing and are not required to exhaust administrative remedies prior to challenging the FEC's authority to promulgate the Debate Regulations. Accordingly, I recommend that the FEC's motion to dismiss the Amended Complaint be denied with respect to these plaintiffs. As the remaining plaintiffs lack standing, their claims should be dismissed.

Because FECA does not clearly preclude the challenged regulations, and because those regulations reflect a reasonable interpretation of the statute, the FEC acted within its authority in promulgating them. Therefore, I further recommend that the plaintiffs' motion for summary judgment be denied and the defendant's cross-motion be granted.[1] Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Barbara S.

[1] I also recommend that the FEC's motion to strike be denied as moot since consideration of the disputed evidence does not alter the ultimate conclusion that the FEC's interpretation of the statute is reasonable and its regulations valid.

Jones, Room 2103, 40 Foley Square, New York, New York 10007, and to the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007.

Respectfully submitted,

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
December 11, 2000

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